(emphasis added); *In re General Development Corp.*, 84 F.3d 1364, 1375 (11th Cir. 1996) (*per curiam*) (applying a "functional approach" to assessing a transaction under § 365, and concluding that the particular transaction at issue there was not governed by its label);[1] *Moreggia*, 852 F.2d at 1182-86 (looking to "the *economic realities* of [the] particular arrangement" and concluding that the particular transaction at issue there was not governed by its label) (emphasis added); *PCH Assocs.*, 804 F.2d at 199-201 (looking to "the circumstances of the case and ... the *economic substance* of the transaction" and concluding that the particular transaction at issue there was not governed by its label) (emphasis added); *cf. Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978) (instructing courts, in the tax context, to disregard "features that have *meaningless labels attached*" and

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[1] *General Development*, which petitioners do not cite, rebuts their assertion that the Eleventh Circuit adopted a formalistic approach to § 365 in *In re Martin Bros. Toolmakers, Inc.*, 796 F.2d 1435 (11th Cir. 1986). *See* Pet. 5-6, 13, 25. As *General Development* explains, *Martin* itself neither squarely adopted nor rejected a functional approach, but "appears more inclined to embrace the 'functional approach.'" 84 F.3d at 1375 (quoting *Martin*, 796 F.2d at 1439 ("The determination in bankruptcy ... of whether a particular agreement is in fact a lease or a security agreement for purposes of § 365 often depends on which characterization will best serve the interests of the estate.")); *see also id.* (concluding, based on *Martin*, that "the Eleventh Circuit is more amenable toward the functional approach"). *Martin* simply held that, under Alabama law, the particular agreement at issue there was in fact a true "lease," just as it had been labeled by the parties. *See* 796 F.2d at 1438-41 & nn.5, 6. As *General Development* makes clear, *Martin* in no way holds that *every* transaction denominated a "lease" must be characterized as a "lease" within the meaning of § 365.

instead focus on a transaction's "economic substance") (emphasis added).[2]

Contrary to petitioners' argument, the decision below is neither "unfair" nor a "windfall" for United. Pet. 6, 12. Because United is in bankruptcy, the real issue here is whether petitioners get to cut in line in front of United's other creditors. Petitioners' formalistic approach to § 365 would put airlines attempting to emerge from bankruptcy to the Hobson's choice of either depleting the resources available to all creditors or surrendering assets important to their continued business operations.

Finally, petitioners' distinct argument that the Seventh Circuit "err[ed] by refusing to apply the governing state law burden of proof and statute of limitations," Pet. i; *see also id.* at 5, 16-23, is equally meritless. As an initial matter, petitioners do not allege any circuit conflict on this point; rather, they simply ask this court to engage in alleged error-correction. And the alleged "errors" are fanciful in any event.

The burden of proof played no role in the decision below: the Seventh Circuit did not conclude that

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[2] Petitioners' suggestion of an intra-circuit conflict between the decision below and *In re Kassuba*, 562 F.2d 511 (7th Cir. 1977), is misplaced. *Kassuba* instructed courts, in applying § 365, to "examine every fact or circumstance tending to illustrate the purpose and intent of the parties to determine whether the transaction was an equitable mortgage" as opposed to a lease. *Id.* at 514 (internal quotation omitted). If anything, thus, *Kassuba* supports, rather than undermines, the functional approach followed by the Seventh Circuit under California law in this case. And, as noted above, any discrepancy may be explained by reference to different state laws. In any event, of course, this Court does not sit to review alleged intra-circuit conflicts: that is the function of the *en banc* process. Here, not a single judge on the Seventh Circuit voted to rehear this case *en banc*. *See* Pet. App. 75.

petitioners had failed to carry their burden of showing that that transaction here was a "lease," but rather that the transaction simply was not a "lease" as a matter of California law. The fact that "United submitted no evidence below," and instead "relied on the terms of the documents," Pet. 20, only underscores this point. Because this case arose on cross-motions for summary judgment, the Seventh Circuit necessarily concluded that no genuine issues of material fact were in dispute, so that the question of which party would carry the burden of proof on such an issue at a hypothetical trial is irrelevant.

Petitioners' "statute of limitations" argument is equally misplaced. The California "validation statute" on which petitioners rely is, as the Seventh Circuit noted, *see* Pet. App. 18, inapplicable by its own terms. United is not seeking to invalidate or otherwise challenge its transaction with CSCDA and HSBC; rather, the only question is how that transaction is to be characterized for federal bankruptcy purposes. In any event, the district court held that petitioners waived this argument by failing to present it to the bankruptcy court, Pet. App. 32-33, and the Seventh Circuit left that finding undisturbed, Pet. App. 17.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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